

Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

APR - 7 2003

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)

Review of the Commission's Broadcast and Cable
 Equal Employment Opportunity Rules and Policies)

MM Docket No. 98-204

TO THE COMMISSION

**REPLY TO OPPOSITIONS TO "PETITION FOR CLARIFICATION,
 OR, IN THE ALTERNATIVE, FOR PARTIAL RECONSIDERATION"**

The EEO Supporters, who are listed in Annex I to their February 6, 2003 "Petition for Clarification, or, in the Alternative, for Partial Reconsideration" ("Petition"), respectfully reply to the March 24, 2003 oppositions of 43 state broadcast associations ("43 STBAs") and of the Alaska Broadcasters Association and three others ("AK Broadcasters").^{1/}

**1. No Reason Has Been Offered For The Commission To Disregard
 Compelling Evidence Of Systemic Discrimination In Broadcasting**

On October 1, 2002, the Petition was supplemented with the filing of the Blumrosens Study,^{2/} which found that broadcasting was infected with the presence of large numbers of discriminators. The study was prepared over a three year period by the nation's most distinguished experts on employment discrimination. Surprisingly, the Commission dismissed the study in a footnote which stated that "we are not convinced that deviations below the average employment rate can be equated with intentional discrimination."^{3/} The EEO Supporters noted

^{1/} The views expressed herein are the institutional views of the commenting organizations, and are not intended to reflect the individual views of each of their officers, directors or members. The Petition inadvertently referred to reconsideration under Section 1.106. On February 26, 2003 Petitioners filed an erratum providing the correct citation, Section 1.429. No party claimed that this error prejudiced them, and parties understood what the petition attempted to accomplish.

^{2/} The Reality of Intentional Job Discrimination in Metropolitan America - 1999 by Alfred W. Blumrosen and Ruth G. Blumrosen (Rutgers University, 2002) (the "Blumrosens Study"), discussed in the EEO Supporters October 1, 2002 Ex Parte Letter, pp. 12-17 (finding, inter alia, that 15% of broadcasters discriminate intentionally against women, 20% against African Americans and 24% against Hispanics; see Blumrosens Study, pp. 204-205).

^{3/} Broadcast and Cable Equal Employment Opportunity Rules and Policies (Second Report and Order), 17 FCC Rcd 24018, 24039 n. 110 (2002) ("Second R&O"). The footnote in question is referred to herein as "Footnote 110."

that aggregate statistical evidence of either the persistence or the diminution of discrimination would be essential to the Commission's ability to fine-tune and design appropriate enforcement mechanisms for the underlying nondiscrimination, recruitment and outreach regulations.^{4/} Further, the EEO Supporters maintained that the suggestion in Footnote 110 that "we are not convinced that deviations below the average employment rate can be equated with intentional discrimination" appears to be the only time, in 40 years of civil rights jurisprudence, that any federal tribunal has suggested that statistical evidence cannot be probative of intentional discrimination.^{5/} Thus, the EEO Supporters asked the Commission to "reaffirm that aggregate statistical data is indeed probative of the EEO performance of an industry, including, in some instances, the extent of intentional discrimination."^{6/} In response, the 43 STBAs present four arguments.

First, they maintain that reconsideration "is plainly not the time or the place for adjudication of what are essentially character allegations against the entire broadcast industry.?" The 43 STBAs' characterization of the Blumrosens Study is right on target. Uncomfortable though it may be, the Blumrosens Study does implicitly call into question the character of approximately one-fifth of the broadcasting industry.^{8/} Reconsideration is as good a time as any

^{4/} Petition at 3

^{5/} Id. at 4. Just six weeks ago, the Supreme Court (8-1) recognized that "statistical evidence alone" can "raise[] some debate" as to whether the prosecution in a criminal case "acted with a race-based reason when striking prospective jurors. The prosecutors used their peremptory strikes to exclude 91% of the eligible African-American venire members, and only one served on petitioner's jury. In total, 10 of the prosecutor's 14 peremptory strikes were used against African-Americans. Happenstance is unlikely to produce this disparity." Miller-El v. Cockrell, 123 S.Ct. 1029, 1042 (2003); see also id. at 1044 (citing, with approval, the Court's holding in Batson v. Kentucky, 476 U.S. 79, 93 (1986) that "[c]ircumstantial evidence of invidious intent may include proof of disproportionate impact.... We have observed that under some circumstances proof of discriminatory impact 'may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds'").

^{6/} Petition at 4

^{7/} 43 STBAs Opposition at 5

^{8/} See, e.g., Bilingual Bicultural Coalition on the Mass M e d i a s, 595 F.2d 621, 628-29 (D.C. Cir. 1978).

to exatnine behavior that has always offended the Commission's conscience and that ought to offend the 43 STBAs' consciences loo. We presented highly competent evidence that one-fifth of the large employers in our nation's most influential industry discriminate. That deserved far more than a footnote

Second, the 43 STBAs maintain that the Blumrosens Study "came too late in the proceeding for the Commission to evaluate it or for interested parties to comment on it."^{9/} They state that the EEO Supporters "had numerous opportunities to present the study since its release in 1999 - yet failed to do so"^{10/} and they contend that in order to examine the study, the Commission would have to "commence a new rule making proceeding so that interested parties could provide full critiques of the Blumrosen Study and present their own rebuttal methodologies and findings."^{11/} The 43 STBAs do not appear to have familiarized themselves with the study. Its publication was effectuated online, section by section, over a period of several months. While the study relies on 1999 data, its national industry reports, which included broadcasting, were not published until August, 2002.^{12/} Nonetheless, the STBAs had no difficulty commenting on the study a month after the EEO Supporters tiled excerpts and a link to the entire study.^{13/}

^{9/} 43 STBAs Opposition at 2. The STBAs themselves filed extensive new materials long after the comment period had expired. See Letter to Hon. Marlene Dortch, August 1, 2002, from Richard Zaragoza, Esq., August 1, 2003, containing an entire new "Draft Rule 73.2080" and extenaive argument concerning the draft rule. Just last Friday, April 3, 2003, in their "Joint Consolidated Reply to the Two Partial Oppositions Filed Against the Forty-Plus State Broadcasters Associations' 'Joint Petition for Reconsideration and Clarification'" ("Joint Consolidated Reply"), the 43 STBAs filed 46 pages (rather than the permissible ten) primarily containing new material and new arguments buttressing their scattershot list of objections to virtually every material sentence of the new rules.

^{10/} Id. at 5

^{11/} Id. at 4

^{12/} Consideration of the Blumrosens Study on reconsideration is allowed under 47 C.F.R. §1.429(b)(1) and (2), since the portion of the study reporting discrimination by the broadcasting industry was released in August, 2002, three months after the reply comment date. See This Week in Civil Rights, Vol. 3 No. 29 (August 9, 2002); see also EEO Supporters October 1, 2002 Ex Parte Letter, p. 12.

^{13/} See Letter to Hon. Marlene Dortch from Richard Zaragoza. Esq., October 28, 2002

Neither then, nor now, five months later, has any party called the study's methodology or conclusions into question.

Third, the 43 STBAs state that the findings of the Blumrosens Study are not claimed by the CEO Supporters to be "necessary predicates for the new EEO regulations."^{14/} EEO regulations based on the need to prevent discrimination are certainly buttressed by a study showing that discrimination is rampant. And if, as the EEO Supporters have urged repeatedly, the regulations are also justifiable as a remedial measure, nothing could be more germane than a study showing that widespread discrimination persists even today. The 43 STBAs have never admitted that there is any discrimination in broadcasting, and it is obvious that their strategy of attacking each of dozens of purported flaws in the Second R&O is a predicate to yet another appeal aimed at avoiding EEO regulation entirely.^{15/} Thus, regrettably, it is essential that the Commission acknowledge and address every significant piece of evidence that illuminates the need to have and enforce these regulations.^{16/}

^{14/} 43 **STBAs** Opposition at 3. Along the same lines, the 43 **STBAs** repeat their often-made suggestion that the EEO Supporters' tendering of aggregate industrywide statistics means that individual statistics will be used impermissibly. 43 STBAs Opposition at 3. This allegation is both illogical and baseless. Industrywide statistics are used to frame and fine-tune regulations and to develop aggregate enforcement plans. Aggregate statistics have nothing to do with individual stations. The Blumrosens Study does not even identify individual businesses.

^{15/} The Joint Consolidated Reply, April 3, 2003, p. 1, contains this veiled threat: "[t]he continued participation of the State Associations on reconsideration and clarification remains without prejudice to any position any of them may **take** in connection with the Second R&O and the regulations adopted thereunder."

^{16/} An example of the 43 **STBAs'** refusal to acknowledge obviously irresponsible behavior is their repented failure to address, in a meaningful way, the implications of the EEO Supporters' un rebutted study finding that 42% of broadcast stations' postings on state association websites omitted the "EOE" tags that reassure job-seekers that the employer will consider their qualifications without discrimination. See MMTc Reply Comments at 28-31. Certainly a broadcaster's deliberate removal of "EOE" tags could be one piece of evidence of discrimination. Yet the 43 STBAs reaction to this finding was to state that the EEO Supporters "argue[] that all of the broadcast stations which do not use the 'EOE' designation are racial discriminators." 43 STBAs Opposition at 5. Obviously, the EEO Supporters never made any such blanket allegation. The 43 STBAs even claim that "there is absolutely no evidence that broadcasters 'went to the trouble to delete' the EOE designation[.]" 43 **STBAs** Opposition at 5, quoting Petition at n. 3. However, it is undisputed that these designations had previously been contained in virtually all broadcasters' job notices for a generation. Do the 43 STBAs mean to suggest that these designations just magically disappeared, all of a sudden, by accident?

Fourth, the 43 STBAs state that the Blumrosens Study is “fatally defective” because it “does not acknowledge or take into consideration that the broadcast industry has operated under a blanket of FCC EEO regulations for some three decades and that the industry’s hiring of minorities and women reflects not only a positive trend but also levels in excess of other industries.”^{17/} However, the purpose of the Blumrosens Study was to identify discrimination, not explain it. The study was a photograph of dozens of industries and the prevalence of discrimination in each of them. The Study identified the prevalence in each of those industries of employers who were outliers (“core thumbs” in the words of the study) -- companies whose employment profiles are extremely removed from industry norms. Using well established statistical standards, repeatedly approved by the federal courts, it was possible for the Blumrosens to conclude, with near certainty, that specific percentages of the large employers in each of these industries are intentional discriminators. The Blumrosens did not attempt to explain why one industry behaved worse than another, nor need they have done so. A number of factors could have accounted for the poor behavior of some industries relative to others, including how close-knit an industry is, whether its large firms inherited a culture of discrimination, whether the unions in the industry tended to support or (like AFTRA) oppose discrimination, and whether the industry has been the beneficiary of an effective federal civil rights enforcement effort. In the case of broadcasting, the fact that the industry continues to harbor so many discriminators -- even after 30 years of EEO regulation -- hardly advances the 43 STBAs’ cause.

Certainly the broadcasting industry as a whole has improved its performance, and many broadcasters do quite well in minority and female employment. However, discrimination still persists among a significant portion of broadcast licensees. For example, what else could account for the disturbing finding last month by the Most Influential Women in Radio (MIW) that only 10% of all radio program directors, only 17% of General Managers and only 31% of General

^{17/} 43 STBAs Opposition at 3

Sales Managers are women?^{18/} It is far too late for the usual excuse that there are not enough qualified women in the pipeline. For nearly a generation, our nation's undergraduate broadcasting departments' enrollments have been majority-female. Consequently, today there should be even more women than men who are qualified to be PDs, GMs and GSMs. What else then, except years of discriminatory practices like hiring women to be "assistant producers" and men to be on-air announcers, and assigning women to "research" or "traffic" while men become account executives, explains these gross disparities?

Commission consideration of the Blumrosens Study and vacation of Footnote 110 would not be a declaratory ruling.^{19/} Rather, the honest acknowledgment of discrimination, and an express recognition that statistics are often probative of discrimination, would enhance the Commission's ability to enforce and refine both the nondiscrimination and outreach portions of its rules.

2. EEO Opponents Have Provided No Reason Why The Commission Should Cut Back On EEO Protection In Rural America

In the Second R&O, the Commission decided to allow broadcasters in "small markets" (i.e., rural areas) to perform only two, rather than four, outreach steps every two years.^{20/} This surprising ruling was necessarily based on five critical but erroneous findings of fact:

First, that it is inherently less important to rural Americans, relative to urban Americans, to receive the fruits of equal opportunity. To be sure, the Commission considered the supposed short-term financial benefits to rural broadcasters of providing less opportunity than urban broadcasters. However, at no point in its ruling did the Commission consider the impact of its decision on the ultimate beneficiaries of the EEO rules -- America's broadcasting consumers.

Second, that no long term harm is done to the broadcasting industry if some broadcasters are permitted to provide less opportunity than others. In rendering this finding, the Commission

^{18/} See Most Influential Women in Radio, "Female PD's A Rarity In The Radio Industry, (March — 2003).

^{19/} — See AK Broadcasters Opposition, p. 2.

^{XI/} Second R&O, 17 FCC Rcd at 24071 ¶170

ignored the fact that careers in broadcasting typically start in small markets and gravitate to large ones.^{21/} The Commission should have realized that pollution upstream inevitably taints the wells downstream.

Third, that it is market size, and not other factors such as staff size, which might constrain a broadcaster's ability to provide even the extremely modest levels of outreach required by these regulations. The Commission did not cite an example (none having appeared in the record) of a small market in which such outreach is not possible.

Fourth, that even in the very small markets where it might be difficult to stage a job fair, it would be impossible for a broadcaster -- especially a large one -- to choose four of the other twelve Prong 3 options. Again, no evidence was cited in the Second R&O for this finding, nor does any appear in the record.^{22/}

Fifth, that the correct line to be drawn separating consumers receiving First Class equal opportunity and those receiving back-or-the-bus opportunity is MSAs of less than 250,000 population.^{23/} The Second R&O did not state where this number came from. The record contains no evidence that a line should be drawn at all -- or that if there can be a line, it should be drawn in any specific place,

The first four of these findings were not even expressly stated, although they were essential predicates to the conclusion the Commission reached. The fifth finding was stated, but it was based on no record evidence, no analysis, and no reasoning. It was a textbook example of a number literally plucked out of the sky. Agencies cannot do that.^{24/}

^{21/} As the EEO Supporters explained, "the broadcasting industry's personnel ladder is structured in a way that drives entry level personnel into small markets for their initial in-service training...[w]hen minorities and women are denied a meaningful opportunity to enter [the] small-to-large market or small-to-large station pipeline, the larger stations will inevitably be forced to hire from smaller pools of experienced persons." EEO Supporters Comments, p. 98 n. 209 and p. 99.

^{22/} See discussion in the Petition, pp. 6-7.

^{23/} Second R&O, 17 FCC Rcd at 24071 ¶170

^{24/} See, e.g., Sinclair Broadcast Group, Inc., 284 F.3d 148, 162 (D.C. Cir. 2002), rehearing and rehearing en banc denied, August 12, 2002.

The stale associations offer no useful support for the Commission's unfortunate decision to deprive rural Americans of the full fruits of broad outreach. The 43 **STBAs** present their merits argument in a single sentence:

The [two-activity] qualifier is based on the Commission's recognition that every community is not the same in terms of the types and numbers of educational, business and civic organizations present in a station's community and with which a station may work to expand an awareness of opportunities in broadcasting. ^{25/}

This opaque sentence could just as easily justify requiring broadcasters in large markets to perform ten times more outreach than other broadcasters. It certainly does not explain why some citizens should by mere accident of geography receive less EEO outreach than other citizens

As we noted in the Petition, the Commission will soon obtain a critical database and render an historic decision which would permit it to regulate more thoughtfully in the EEO field.^{26/} The Commission will have industrywide Form 395 data available in September. Further, the media structural ownership proceeding should be completed in June, enabling the Commission to predict trends in local station cluster size and employment levels. We respectfully urge the agency to obtain and analyze this data on current employment unit size and future employment trends, and then rule promptly on the issue presented in our Petition

Respectfully submitted,

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April 7, 2003

^{25/} 43 **STBAs** Opposition at 7.

^{26/} Petition at 7.

CERTIFICATE OF SERVICE

I, David Honig, hereby certify that I have this 7th day of April, 2003 caused a copy of the foregoing "REPLY TO OPPOSITIONS TO 'PETITION FOR CLARIFICATION, OR, IN THE ALTERNATIVE, FOR PARTIAL RECONSIDERATION'" to be delivered by U.S. First Class Mail, postage prepaid, to the following:

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